

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER

LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JONATHAN SO

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
OF COUNSEL

COURT OF APPEALS, NEW YORK
Matter of Joseph Terranova, Appellant

v.

Lehr Construction Co, Employer

Decided December 19, 2017

Facts: The claimant sustained injuries at work, when he injured his right knee on a raised floor tile. He filed a claim for workers' compensation benefits against his employer as well as filing a third party claim against the party responsible for the defective tile. Prior to the final resolution of the workers' compensation claim, he settled his lawsuit with the consent of the workers' compensation carrier. The consent letter stated that the "lien reimbursement reflects a reduction of the carrier's lien pursuant to Kelly v. State Insurance Funds [sic] and all parties reserve all their rights to Burns v. Varriale." The claimant was later awarded a 10% schedule loss of use finding to the knee. The judge, the board and the Appellate Division all noted that because this was the type of injury that had an ascertainable present value, there should be no apportionment of the litigation expenses contemplated in Burns.

Holding: Reversed.

Discussion: The Court provided the history of its earlier decisions in Kelly v. State Ins. Fund 60 NYS2d 131 (1983), and in Burns v. Varriale, 9 NY3d 207 (2007). In referencing Burns, The Court noted in that decision that the "pay as you go" process would apply when "a claimant does not receive benefits for death, total disability[,] or schedule loss of use" (id. at 215). However the Court noted in the current case that the decisions did not contemplate a situation when the third party action resolves prior to the settlement of the workers' compensation case. In addition, the Court noted that the consent letter specifically confirmed the claimant's rights to a calculation under Burns. The Court went on to note that the initial negotiations in this case confirmed the claimant initially rejected an offer by the carrier for the claimant to forgo Burns. "Were there any ambiguities, they

would "be resolved against the carrier" (Matter of Brisson v County of Onondaga, 6 NY3d at 279".

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